STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 128340
Court of Appeals No. 256354

vs

Kent County Circuit Court
No. 01-02731-FC

KENNETH JAY HOULIHAN,

Defendant-Appellant.
_____/

BRIEF OF AMICUS CURIAE

128340

IN SUPPORT OF

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

BY: Richard B. Ginsberg (P 14018)
Attorney at Law
P.O. Box 7378
Ann Arbor, Michigan 48107
(734) 213-0918

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF APPELLATE JURISDICTION

Amicus Curiae adopt and incorporate herein the statement of jurisdiction set forth by Defendant-Appellant.

STATEMENT OF QUESTION PRESENTED

WHETHER THE UNITED STATES SUPREME COURT'S DECISION IN *HALBERT V. MICHIGAN*, 545 U.S. --- , 125 S.CT. 2582 (2005) IS FULLY RETROACTIVE AND COUNSEL MUST BE APPOINTED TO DEFENDANT-APPELLANT HOULIHAN, AND ALL OTHER INDIGENT DEFENDANTS WHO WERE IMPROPERLY DENIED THE ASSISTANCE OF APPOINTED COUNSEL IN PURSUING FIRST-TIER APPELLATE REVIEW OF A PLEA-BASED CONVICTION?

STATEMENT OF FACTS

Amicus Curiae adopt and incorporate herein the statement of facts set forth by Defendant-Appellant, with the following addition:

On June 23, 2005, the United States Supreme Court held that "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert v. Michigan*, 545 U.S. ---, 125 S.CT. 2582, 2586 (2005). Prior to the release of the *Halbert* opinion, Defendant Houlihan and other defendants convicted after entering guilty pleas had been told they had no right to appointed appellate counsel and/or had requested the appointment of counsel for purposes of appellate review but had those requests denied. The denials were the result of various Circuit Judges concluding that an amendment to the Michigan Constitution of 1963 Art. I, §20, known as "Proposal B" (effective December 24, 1994) relieved counties of the obligation to provide indigent defendants with appellate counsel after plea-based convictions.

Proposal B did not speak to the issue of counsel. What it did was change the procedural vehicle for seeking appellate review of a plea-based conviction by stating that "[i]n every criminal prosecution, the accused shall . . . have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . .". Mich. Const. 1963, Art. I, §20. No change was made to the constitutional provision for counsel "as may be necessary to perfect and prosecute an appeal." *Id.* Nevertheless, Proposal B inspired many trial court judges to deny the appointment of counsel to indigent defendants seeking leave to appeal their guilty plea conviction and/or sentence solely

because the appeal was discretionary. *Bulger v Curtis*, 328 F. Supp. 2d 692, 702 (E. D. Mich. 2004). These decisions were affirmed by subsequent legislation, court rules, and decisions requiring the denial of appointed counsel in guilty plea appeals. *See generally*, M.C.L. §770.3a (effective March 10, 2000), portions of M.C.R. 6.302, 6.425, 6.615 and 6.625 (effective as to pleas taken on or after April 1, 2000), and *People v. Harris*, 470 Mich. 882 (2004).

At all times both before and after the enactment of Proposal B, criminal defendants were welcome to retain counsel at their own expense and proceed with an application for leave to appeal with the assistance of said counsel. The legislation and corresponding court rules only precluded the appointment of counsel to assist in these plea-based appeals. The legislation itself was held unconstitutional in *Tesmer v. Granholm*, 114 F. Supp. 2d 603 (E. D. Mich. March 31, 2000). Ultimately the United States Supreme Court found that the attorneys in *Tesmer* lacked standing to challenge the practice of denying counsel to hypothetical clients. *Kowalski v. Tesmer*, 543 U.S. 125 (2004). However, Antonio Dewayne Halbert was a proper plaintiff and in his case the United States Supreme Court declared that the appointment of appointed counsel must not be denied to defendants who plead guilty but who still wanted to appeal their conviction or sentence. The Court further found that any other policy or practice violates both the Due Process and Equal Protection clauses of the United States Constitution. *Halbert, supra*, 125 S.Ct. at 2586.

In spite of pleading guilty, Defendant Houlihan, like many other defendants, asked for appointed counsel to represent him in this "first-tier" of Michigan's appellate system. When he was denied counsel, he appealed that denial to the Michigan Court of Appeals and to this Court, where relief was also denied. *See generally*, Defendant-Appellant's application for leave to

appeal. He then sought substantive relief on the merits of his appellate issues by way of a post-conviction motion for relief from judgment, while still requesting the assistance of counsel to assist him in those proceedings. The question before this Court concerns the retroactivity of the *Halbert* decision on Houlihan and all other indigent defendants whose request for the appointment of appellate counsel was denied or who were told that they had no right to appointed appellate counsel.

On September 23, 2005, this Court, acting on Defendant-Appellant Houlihan's application for leave to appeal, directed the parties to address "whether the holding in *Halbert v. Michigan*, 545 U.S. ---, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), retroactively applies to defendant's motion for relief from judgment from his plea-based conviction where the trial court denied his request for the appointment of appellate counsel to assist him in pursuing a direct appeal." *People v. Houlihan*, 474 Mich. 866 (2005) (table).

ARGUMENT

THE UNITED STATES SUPREME COURT'S DECISION IN *HALBERT V. MICHIGAN*, 545 U.S. --- , 125 S.CT. 2582 (2005) IS FULLY RETROACTIVE AND COUNSEL MUST BE APPOINTED TO DEFENDANT-APPELLANT HOULIHAN, AND ALL OTHER INDIGENT DEFENDANTS WHO WERE IMPROPERLY DENIED THE ASSISTANCE OF APPOINTED COUNSEL IN PURSUING FIRST-TIER APPELLATE REVIEW OF A PLEA-BASED CONVICTION.

STANDARD OF REVIEW: The retroactivity of the United States Supreme Court's decision in Halbert is an issue of law and is reviewed de novo. *People v. Sexton*, 458 Mich. 43, 52 (1998) (internal citations omitted).

ANALYSIS: A system that denies the appointment of counsel – while welcoming retained counsel – to represent convicted felons seeking appellate relief from their plea-based convictions clearly violates all notions of equal protection. If this equal protection violation "'relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs [then] [t]he due process concern hones in on the essential fairness of the state-ordered proceedings.'" *Halbert, supra* 125 S.Ct. at 2587 (internal citations omitted).

In *Douglas v. California*, 372 U.S. 353 (1963) the United States Supreme Court held that counsel must be provided to indigent criminal defendants in their appeal of right (first appeal). *Id.* at 357. Relying on *Douglas*, the United States Supreme Court held in *Halbert* that counsel must be afforded to indigent defendants seeking leave to appeal plea-based conviction. The Court equated the opportunity to apply for leave to appeal in plea cases to appeals of right

because the Michigan Court of Appeals' decision "on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert, supra*, 125 S. Ct. at 2591. *Halbert* must be made fully retroactive because to do otherwise would perpetuate the injustice arising out of improperly denying indigent defendants the assistance of appointed appellate counsel.

The United States Supreme Court has long recognized that the right to counsel is a fundamental right, and that without the assistance of counsel other substantive and procedural rights lose much of their significance. *See Gideon v. Wainwright*, 372 U.S. 335 (1963), *Douglas v. California, supra*. As the *Douglas* Court recognized, a right to appeal which does not include the right to the assistance of counsel is little more than a hollow shell (an exercise in futility) which does not comport with due process or fundamental fairness. The only appropriate remedy for an improper denial of the right to counsel is to put the defendant in the same position he would have been in had the unconstitutional denial not occurred. Here, that means providing Mr. Houlihan with the assistance of counsel and the same opportunity to seek appellate review that he would have had if the unconstitutional denial not occurred.

A. Full Retroactivity Is Required by Established Principles of Michigan Law.

The general rule in Michigan is that judicial decisions are to be given full retroactive effect. *Hyde v. Univ of Michigan Bd of Regents*, 426 Mich. 223, 240 (1986). However, this Court has held that a more flexible approach is warranted where injustice might result from full retroactivity. *Lindsey v. Harper Hosp*, 455 Mich. 56, 68 (1997). *See also Tebo v. Havlik*, 318 Mich. 350 (1984).

In *People v. Hampton*, 384 Mich. 669 (1971), this Court held that retroactivity in criminal

cases should be determined by applying the following three part test: (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect on the administration of justice. *See also People v. Parker*, 267 Mich. App. 319, 321(2005) citing *Adams v. Dep't of Transportation*, 253 Mich. App. 431, 435 (2002). However, the continuing validity of the three part test is questionable in light of this Court's recent decision in *People v. Cornell*, 466 Mich. 335 (2002). In *Cornell*, this Court cited two civil cases, *Lowe v. Estate Motors Ltd.*, 428 Mich. 439, 475 (1987) and *Murray v. Beyer Mem. Hosp.*, 409 Mich. 217, 221-223 (1980), to support giving its holding limited retroactivity, but did not refer to *Hampton* or the three part test. Under either *Hampton's* three part test or the "injustice" test, the *Halbert* decision is entitled to full retroactive effect.

Making *Halbert* fully retroactive will not cause any injustice. No reliance was placed on so-called "old rule" with respect to the conduct of any trial court proceeding (other that the advise given at sentencing regarding appellate rights or the lack thereof). The only practical effect of the old rule was to deny defendants the opportunity to seek appellate review of their convictions and/or sentences with the assistance of counsel. Providing defendants with meaningful access to the court system, after that access was unconstitutionally denied, cannot be found to cause injustice. As the United States Supreme Court expressly recognized in *Ross v. Moffitt*, 417 U.S. 600, 616 (1974), the State has a duty "to insure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process". As it expressly recognized in *Halbert*, the assistance of counsel is an essential element of an indigent defendant's ability to present his claims fairly in the context of Michigan's appellate process.

Making *Halbert* fully retroactive also satisfies the *Hampton* test. The purpose of the rule is to afford criminal defendants their constitutional right to counsel during a first-tier appeal. The "old rule" - promulgated by the 1994 constitutional amendment and further enhanced by the 2000 legislation designed to deny the constitutional right to counsel - was neither generally relied upon nor universally enforced. To the contrary, only a smattering of counties statewide actively deprived defendants of their right to the appointment of counsel in direct leave-based appeals. Those counties which represent the exception rather than the rule include but are not limited to Saginaw (in the *Halbert* case) and Kent (in the related United States Supreme Court cases of *Harris v. Michigan*, and *Simmons v. Metrish*, 125 S.Ct. 2989 (2005) (mem). Finally, when considering the effect on the administration of justice – all that is being asked of the Courts is to give defendants an attorney if they cannot afford one. The United States Supreme Court has declared this to be a constitutional right in both *Halbert* and *Douglas*. If anything, retroactive application of the rule can only benefit the administration of justice. This Court itself noted "that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts." See Halbert, supra, 125 S.Ct. at 2594 n.6 quoting the now overruled *People v. Bulger*, 462 Mich. 495, 520 (2000). Therefore, retroactive application of the *Halbert* decision on Defendant-Appellant Houlihan and all other similarly situated defendants is fully warranted and should be embraced by this Court.

B. A Teague-Type Analysis is Not Appropriate to a Case in This Procedural Posture.

In its Order of September 23, 2005, this Court suggested that the parties consider the federal rules regarding retroactivity; namely, *Teague v. Lane*, 489 U.S. 288 (1989), *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504 (2004) and *Howard v. United States*, 374 F.3d 1068 (11th

Cir. 2004). Neither *Teague* nor *Beard* support prospective application of the *Halbert* rule, while *Howard* strongly supports its full retroactive application.

The *Teague* approach is not applicable to the situation in the case at bar for several reasons. First, *Teague* was concerned with substantive and procedural decisions affecting how cases are litigated, not meaningful access to appellate review. Second, what was at issue in *Teague* was the applicability of federal court decisions interpreting federal constitutional rights to cased pending on habeas review. In resolving the competing interests, the Court took into account issues of comity and federalism. The rationale behind applying the *Teague* rule is to protect a state's interest in the finality of its judgments. The Court was specifically concerned with the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus" outweighing the benefit of their application. *Teague, supra* at 310 quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984). Non-retroactivity is "a limitation on the power of federal courts to grant 'habeas corpus relief to ... state prisoner [s].'" *Beard v. Banks, supra,* 124 S.Ct. at 2510 citing *Caspari v. Bohlen* 510 U.S. 383, 389 (1994). None of those concerns apply to the situation in the instant case.

The *Teague* dichotomy between direct and collateral review is also not applicable to the situation in the case at bar. That distinction is premised on a defendant who has had a direct appeal with the assistance of counsel being in a different position than a defendant whose appeal of right has not yet become final. Because Mr. Houlihan never had an appeal (or an opportunity to seek leave to appeal) with the assistance of counsel, for purposes of a *Teague* analysis he is in the position of someone whose case is still pending on direct review (because he never had an appeal with the assistance of counsel).

A *Teague* analysis is inherently inapplicable to a case presented in Mr. Houlihan's procedural posture because the request for counsel was raised and preserved (albeit denied) by the state appellate court during the direct appellate proceedings. The origin of the instant action was a post-conviction motion for relief from judgment. Michigan has historically recognized that the absence of counsel during a critical stage of the proceedings – in this case, on direct appeal – would constitute a jurisdictional defect thereby excusing the procedural prerequisites to obtaining relief. *People v. Carpentier*, 446 Mich. 19 (1994).

C. Full Retroactivity Is Required Under a Teague-type Analysis

Even under a *Teague*-type analysis, Mr. Houlihan and other indigent defendants improperly denied the constitutional right to appointed appellate counsel are entitled to relief. The *Teague* approach is to (1) determine the date that the defendant's conviction became final; (2) "ascertain the 'legal landscape as it then existed,' and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule . . .[and (3)] if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity." *Beard v. Banks*, supra 124 S.Ct. at 2510 (internal citations omitted).

The *Halbert* decision does not establish a "new rule." It was based squarely on *Douglas v. California, supra*. Additionally, the United States Supreme Court recognized the need to provide indigent criminal defendants with the assistance of counsel long before the *Douglas* decision in *Powell v. Alabama*, 287 U.S. 45 (1932) (finding a fundamental component of our criminal justice system is an accused's right to be represented by counsel at every critical stage of the proceedings). As the *Halbert* Court observed, a first appeal, whether by leave or by right, constitutes for all practical purposes a direct and initial review of the conviction and sentence.

With due respect to the distinction being made by Appellee between a guilty plea and a guilty verdict, it is a distinction without a difference. "Appeals by defendants convicted on their pleas may involve `myriad and often complicated' substantive issues . . . and may be 'no less complex than other appeals.'" *Halbert, supra*, 125 S.Ct. at 2593 citing *Kowalski v. Tesmer, supra*, 543 U.S. at ---, 125 S.Ct., at 576 (Ginsburg, J., dissenting). Therefore, the right of an indigent defendant to the assistance of appointed counsel in appealing a plea-based conviction is no more a "new rule" than the concept of appointed counsel for indigent defendants in general.

Because *Halbert* does not establish a new rule the inquiry should end there. However, even if *Halbert* does establish a "new rule", that rule falls within the exceptions to *Teague's* non-retroactivity principle because the right to counsel on appeal is "implicit in the concept of ordered liberty." *Beard v. Banks, supra*, 124 S. Ct. at 2513 quoting *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (additional internal citations omitted). An indigent defendant denied the assistance of counsel for first-tier appellate review has been denied an "adequate opportunity" to present his claims fairly in the context of this state's appellate process.

The absence of counsel on appeal is a structural defect which undermines the fairness of the entire proceeding. *Douglas, supra. See also Arizona v. Fulminante*, 499 U.S. 279 (1991) (deprivation of counsel is not subject to harmless error review); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (finding that compliance with the Sixth Amendment is an essential jurisdictional prerequisite to a court's authority to deprive an accused of his life or liberty, unless this right is properly waived, a court can have no jurisdiction to proceed to conviction); *United States v. Cronic*, 466 U.S. 648, 658-659 (1984) (deprivation of counsel at a critical stage of the proceedings is structural error, requiring automatic reversal).

Even a federal court applying a *Teague* analysis would be compelled to grant relief in this case, not because "federal courts are quick to intervene into state proceedings" but because the state trial court "could and should have done a better job of upholding the Constitution." *Mitchell v. Mason, (on remand)* 325 F.3d 732, 749 (6th Cir. 2003) (Carr, J., Dissenting). *Cf.*, *Howard v. United States*, 374 F.3d 1068 (11th Cir. 2004) (holding that the United States Supreme Court decision in *Alabama v. Shelton*, 535 U.S. 654 (2002) that a suspended sentence which has the potential for deprivation of liberty may not be imposed for an uncounseled conviction recognized a new right which is retroactively applicable on collateral review). For the reasons set forth in *Howard*, *Halbert* must be viewed as a watershed rule which implicates fundamental fairness and the accuracy of the criminal proceeding.

Because a right without a remedy is no right at all, the equities support retroactive application of *Halbert* to Mr. Houlihan and the other defendants improperly denied the right to appointed appellate counsel. Many of these defendants had the wherewithal to demand counsel from the earliest stages of the proceedings even in the face of opposition from the Legislature and the Courts telling them that they had no such rights. The reality of *Halbert* is that those Judges and the Legislators were wrong. The invalid statute, M.C.L. §770.3a, which specifically precluded counsel in plea-based appeals, is void *ab initio* and the defendants must be returned to the *status quo ante*. *See generally Briggs v. Campbell, Wyant & Cannon Foundry Co.*, 379 Mich. 160 (1967). This is true even if their direct appeals have technically concluded, because without counsel those "appeals" were invalid. *Penson v. Ohio*, 488 U.S. 75 (1988). To mechanistically apply any other rule, or even to categorize the relief presented by defendants like Mr. Houlihan as "collateral" undermines the spirit of the rights recognized by the United States

Supreme Court in *Halbert* and *Douglas*. All United States Supreme Court decisions addressing a federal constitutional right "apply retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). *See also People v. Sexton*, 458 Mich. 43 (1998) (holding the *Griffith* rule of full retroactivity applies to constitutional errors raised on direct appeal in state court).

For the above reasons, Mr. Houlihan and all other indigent defendants improperly denied the right to appointed appellate counsel should benefit from the *Halbert* decision regardless of the procedural posture of their case. This is especially so if the request for counsel was preserved during the earliest stages of the direct appeal.

RELIEF REQUESTED

For all of these reasons, this Court should GRANT Defendant-Appellant's Application for Leave to Appeal, Appoint Counsel, and fully reinstate the appellate remedies that Mr. Houlihan and all other indigent defendants improperly denied their right to appointed appellate counsel are entitled to pursuant to *Halbert v. Michigan, supra.*

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

BY: Richard B. Ginsberg

Richard B. Ginsberg (P 14018)
Attorney at Law
P.O. Box 7378
Ann Arbor, Michigan 48107
(734) 213-0918

Criminal Defense Attorneys of Michigan
2843 East Grand River. PMB 223 • East Lansing. MI 48823 • (517) 490-1597 • Fax (517) 267-3630 • www.cdam.net

November 1, 2005

Clerk
Supreme Court of Michigan
Michigan Hall of Justice
925 Ottawa Street
Lansing, MI 48909

Re: People v Kenneth Jay Houlihan
Supreme Court No. 128340
Court of Appeals No. 256354
Kent County Circuit Court No. 01-02731-FC

Dear Court Clerk:

Enclosed please find an original and seven (7) copies of Brief of Amicus Curiae in Support of Defendant-Appellant's Application for Leave to Appeal for filing with this court. Thank you for your assistance.

Sincerely,

Richard B. Ginsberg

RBG/jlh
Enclosures